IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.430 OF 2005

M/s.Prashanth Projects Ltd. ... Petitioner

vs.

1. Hindustan Petroleum Corporation Ltd. & another. ... Respondents.

Mr.Gaurav Joshi with Kapil Moye i/b. Makrand Gandhi & Co. for Petitioner.

Mr.M.P.Siodia with Ms.P.S.Retiwala i/b. Rustomji & Ginwala, for Respondent no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 27th September,2006

P.C.:-

1. By this petition the petitioner challenges the Award made by the Sole Arbitrator directing the respondent no.1 to pay certain amount to the petitioner. Before the learned Arbitrator, the petitioner was the claimant. By the Award, the learned Arbitrator has accepted some of the claims made by the claimant-petitioner and has rejected some of the claims made by the petitioner. The Award is dated

20.10.2004. Thereafter it appears that the Arbitrator modified the Award and the modified award is dated 9.11.2004. It appears that under the Award an amount of Rs.35,43,704/- was payable by the respondent no.1 to the petitioner. When the petition was called for final hearing, a preliminary objection to the maintainability of the petition was raised on behalf of the respondent no.1. According to the respondent no.1, after the Award was made alongwith the letter dated 24.12.2004 a cheque of the amount of Rs.35,43,704/- drawn in favour of the petitioner was sent to the petitioner and it was received by the petitioner. In the letter sent alongwith the cheque it was stated that the amount is paid in full and final satisfaction of the Award passed by the Arbitrator. According to the respondent no.1, the petitioner accepted the amount without any protest and has encashed the cheque. After encashing the cheque, the present petition was filed on 9.2.2005. According to the respondent no.1, therefore, in view of the conduct of the petitioner, the petition is not maintainable. The respondent no.1 relies on the judgment of the Supreme Court in the case “Pooran Chand Nangia Vs. National Fertilizers Ltd., (2003)8 Supreme Court Cases 245, a judgment of the Madras High Court in the case “Venkatarayudu & others Vs. (Anumolu Chinna)Rama Erishnnayya & others” AIR 1930 Madras 268, a judgment of Calcutta High Court in the case "Hurrybux Deora Vs. Johurmull Bhotoria & another, AIR 1929 Calcutta 796”, a judgment in the case “Dexters

Limited Vs. Hill Crest Oil Company (Bradford) Limited, 1926 C.A. 348, a judgment of the learned Single judge of this Court in the case "M/s.Govindji Jevat and Co. Vs. Shree Saraswati Mills Ltd, AIR 1982 Bombay 76., a judgment of the Calcutta High Court in the case of "Banku Chandra Bose & another Vs. Marium Begum and another, AIR 1917 Calcutta 546". Relying on the aforesaid judgments the learned Counsel appearing for respondent no.1 submits that after having accepted money without any protest the petitioner cannot maintain this petition. The learned Counsel points out that in view of the provisions of Section 34 of the Arbitration & Conciliation Act, in case this Court finds that the Award made by the learned Arbitrator is liable to be set aside then the Court will have to set aside the entire Award even though in the award certain claims made by the petitioner have been awarded in his favour. The learned Counsel submits that therefore once the petitioner accepts the amount under the Award without any protest this petition is not maintainable. On behalf of the petitioner on the other hand it is submitted that before filing this petition, a letter dated 18.1.2005 was addressed by the petitioner to the respondent no.1 stating therein that the petitioner has accepted the payment without prejudice to its rights and contentions. It is further submitted, relying on the judgment of the Supreme Court in the case "Bhau Ram Vs. Baij Nath Singh & others, AIR 1961 Supreme Court 1327" and also on my judgment in the Arbitration Petition no.463 of

2004 in the case "The Cosmos Co-operative Bank Ltd Vs. M/s. A.C.Enterprises and others " dated 20.9.2005, that merely by accepting the amount of claim by the petitioner awarded under the Award, the petitioner does not loose his right to challenge the Award. Therefore, the petition filed by the petitioner is maintainable. It is also submitted that under Section 34 of the Arbitration Act, this Court has power to modify the Award and therefore, there is no question of this Court setting aside that part of the Award by which some of the claims made by the petitioner have been awarded by the learned Arbitrator in favour of the petitioner.

2. Now in the light of these rival submissions, if the record is perused, it becomes clear that the respondent no. 1 had offered the amount payable by the respondent no.1 to the petitioner under the Award by letter dated 24.12.2004 and at that time admittedly, the petitioner had not filed the present petition. The letter reads as under:--

> “In compliance with the award of the Hon'ble Sole Arbitrator, Shri.R.Roy, in the matter of Arbitration between yourself and HPCL with regard to Purchase Order No.M-0859/LPG/LPP-705/AKS dated 23.2.2000, we are attaching Cheque No.864505 dated 20.12.2004 drawn on SBI, CAG Branch, Mumbai 400001, for Rs.35,43,704/- as full and final

> satisfaction of the award passed by the Hon'ble Arbitrator. (Payment calculation is as per Annexure-I).”

The respondent no.1 has, thus, clearly indicated that the respondent no.1 has paid the amount payable by the respondent no.1 under the Award and it has been paid as full and final satisfaction of the Award passed by the Arbitrator. It is an admitted position before me that the petitioner had accepted this cheque alongwith the letter without making any protest and without saying that it is accepting the letter and the cheque without prejudice to its rights to challenge the Award. The cheque was duly encashed by the petitioner. After encashing the cheque, letter dated 18.1.2005, according to the petitioner, was addressed by him to the respondent no.1. That letter reads as under:-

> "Thank you for cheque no.864505 drawn on SBI Bank, CAG, Mumbai Branch for an amount of Rs.35,43,704/- which we have received on December,24th 2004 without prejudice to our rights and contentions in the above matter ."

What is pertinent to note here is that by 18.1.2005 the amount for which the cheque is given, had already been received by the petitioner. The question is, does this conduct of the petitioner amount to waiver

of the right of the petitioner to file a petition under Section 34 of the Arbitration Act challenging the Award ? Perusal of the judgment in the case of "Pooran Chand Nangia Vs. National Fertilizers Ltd." referred to above shows that in that case the Award was made under Section 48 of the Act by the learned Arbitrator. The claimant accepted the amount awarded by the Award without any protest. It appears that he had also accepted the Award after accepting the Award and after receiving the amount, he filed an objection challenging the award. The Supreme Court, after referring to this, has observed in paragraph 3 as under:-

> "So far as the first question is concerned, it is not disputed that the appellant had received the money which was due to him under the award and once the appellant had submitted to the award unequivocally and without reservation, it is not open to him to challenge the award. We have looked into the record and find that the appellant had submitted unequivocally to the jurisdiction of the arbitrator. He also accepted the awarded amount without any reservation. Had the appellant desired to challenge the Award, he could have reserved his right to do so, but no such reservation was made in the letters sent by him. In this view of the matter, there remains no manner of doubt about the fact that the appellant had submitted to the award and it does not lie in the mouth of the appellant had submitted to the award and it does not lie in the mouth of the appellant to challenge the award. For these reasons, we reject

> the first argument of the learned Counsel for the appellant."

Perusal of the above paragraph shows that while accepting the amount the appellant in that case did not reserve his right to challenge the award which was necessary for him to do, before accepting the amount. Therefore, what the Supreme Court has observed is that if the person to whom the amount is payable under the Award accepts the amount offered to him without indicating that he is accepting the amount reserving his right to challenge the Award then acceptance of the amount by that person amounts to waiver of his right to challenge the Award. Perusal of the judgment of the learned single Judge of this court in the case "M/s.Govindji Jevat & Co. Vs. Shree Saraswati Mills Ltd." shows that in that judgment the learned Single Judge in paragraph (5) has referred to the submission made on behalf of the Respondent that the petitioner having accepted the payment under the decision of the Board of Directors of the said Association, the petitioner is estopped from challenging the Award. In paragraph 6 the Court refers to the Division Bench judgment of this Court and in paragraph 7 the learned Single Judge refers to the judgment in the case "Lissenden vs. C.A.V.Bosch Limited, 1940 AC 412.". In paragraph 8 the learned Single judge has made distinction between a decree and the Award made by the learned Arbitrator. The observations of the Court

in paragraph 7 and 8 in my opinion are relevant. They read as under:-

> "7. The next authority which is cited by Mr.Jhunjhunwala is 1940 AC 412, Lissenden V. C.A.V.Bosch Limited. In that case an award was made by a County Court under the Workmen's Compensation Act for payment of certain weekly amount to a worker. There was a right to appeal against the said award given by the rules framed under the Act. The Worker after accepting some weekly payments, filed an appeal challenging the award and it was contended that the appeal was barred on the principle of "approbate and reporbate". It was held by the House of Lords that this principle may be applicable to the award in normal sense of the petition to challenge the award but was not applicable and was not appropriate in the case of an appeal from an order of Court and complete different principles applied in such a case. It was held in that case that the award was in the nature of an order of the Court and appeal was a normal right of appeal provided by statute as in the case of Court's orders and decrees. This case was therefore, not directly a case of an award as is normally understood. However, while explaining the difference between the position as applicable to an appeal against orders of Court and petition for setting aside an award, the House of Lords has stated at page 434 as follows:
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> "In arbitration in the ordinary sense the award is the fruit of a consensual agreement under which

the parties have agreed to accept the arbitrator's award, which thus governs them by their agreement. There is no appeal in the proper sense of the term. The Court has certain powers over arbitrators, which the parties may invoke. Thus a party may claim that the award was made without jurisdiction or that the arbitrator was guilty of misconduct and that for those or other like reasons should be set aside. A party who has treated the award as valid, for instance, by accepting payment of what it awarded him, would generally be barred from adopting the inconsistent attitude of claiming to set it aside. It might them be said that he could not affirm and disaffirm or perhaps even that he could not approbate and reprobate."

8. The principle that emerges from the two decisions is that it is possible in an appeal against decree or order of Court to confirm the same partly and set aside the same partly even though two parts may not be severable. Another thing to be noted in such a case is that when an appellant challenges a decree against him, the result of the appeal can only be adverse to the appellant to the extent of his challenge in case his challenge fails and if he succeeds only that part is set aside while the part of the decree which is not challenged remains untouched; therefore, the appellant when he receives the money or some other benefit under the decree under challenge always retains the benefit whether he wins or loses the appeal. This is not the

> position in the case of an award. Whenever an award is challenged on whatever ground it may be, the award has to be set aside in toto or if made in parts, the entire part challenged and thereafter there will not exist any basis for the person challenging the award to retain the benefit received by him under the award or the part of the award which is challenged. In my view this is an important distinction between an award and a decree or order of the Court."

The learned Single judge has thus in his judgment held that when a decree or an order of the Court is challenged it is possible for the Appeal Court to set aside only a part of the decree to the extent the decree is challenged. In case of the Award however, when the Court finds that a part of the Award which is challenged in the petition is not sustainable, the Court has to set aside the entire Award as the Court does not have power to modify the Award. The learned Single Judge was considering the position under the provisions of 1940 s Act. In so far as 1996's Act is concerned, perusal of the provisions under Section 34 of the Act shows that power is conferred on the Court to set aside the Award made by the Arbitrator. It is only clause (a)(iv) of sub-section (2) of Section 34 of the Act which gives power to the Court to modify the Award where the Court finds that the Award is not in accordance with law because it decides certain disputes not

contemplated by submission to arbitration. Therefore, except where clause (a)(iv) of sub-section (2) of Section 34 of the Act applies, the only power of the Court is to set aside the Award, Court cannot modify the Award. Therefore, if the petition challenging the Award succeeds, the Court will have to set aside the entire award including that part of the award under which the petitioner has received the payment.

3. Now so far as the judgment of the Supreme Court relied on by the petitioner is concerned, firstly in that case the Court was considering the case of challenge to a decree, secondly the majority judgment in the case of "Bhau Ram" finds that price of pre-emption which was received by the parties cannot be characterised as a benefit under the decree. The observation in that regard in paragraph 5 reads as under:-

> " Upon the principles underlying the aforesaid decisions a person who takes benefit under an order de hors the claim on merits cannot repudiate that part of the order which is detrimental to him because the order is to take effect in its entirety. How can it be said that a vendee in a pre-emption suit against whom a decree is passed takes any "benefit" thereunder? No doubt, he has a right to be paid the pre-emption price before the pre-emption decree becomes effective but the price of pre-emption cannot be characterised as a benefit under

> the decree. It is only in the nature of compensation to the vendee for the loss of his property. For this reason the principle of the aforesaid decision would not apply to such a decree."

The majority judgment thus, after finding that the amount that was withdrawn by the parties was not a benefit under the decree, holds that by accepting the amount parties did not give up their right to challenge the decree. The learned Counsel also took me through the minority judgment. The difference between the majority judgment and the minority judgment is that the majority view held that price of pre-emption cannot be characterised as benefit under the decree, whereas according to the minority view it is payment under the decree. In so far as the present case is concerned, it goes without saying that the amounts which have been paid by the respondent no.1 to the petitioner are payments made under the Award. So far as the reliance placed on my judgment in the case "The Cosmos Co-op.Bank Ltd" is concerned, in that case, the Co-operative Bank had made a claim for recovery of Rs.2,08,280.05 and Rs.1,14,524/-. In the arbitration proceedings, the opponent made an offer that certain amount should be accepted by the bank as full and final settlement of the claim. The bank did not accept that offer. The Arbitrator however directed the bank to accept the amount offered by the opponent as full and final satisfaction of the claim and made the Award for the amount which

was offered by the opponent. That amount was tendered by the opponent to the bank, the bank accepted the amount under protest. I found that the amount which was offered by the opponent was due to the bank, in any case, even independently of the Award. The bank in that case did not become entitled to the amount, because the award was made by the learned Arbitrator, and therefore, relying on the judgment of the Supreme Court in the Bhauram's case it was held that the acceptance of the amount by the bank under protest reserving its rights to challenge the Award does not amount to waiver of its right to file petition challenging the Award. In my opinion, the objection raised on behalf of the respondent no.1 in the present case is well founded. The conduct of the petitioner of accepting the amount offered by the respondent no.1 as full and final satisfaction of the award without making any protest amounts to waiver by the petitioner of its rights to challenge the Award. So far as the letter of the petitioner dated 18.1.2005 is concerned, in my opinion, it does not help the petitioner in any way because that letter was written after the cheque was realised.

4. Taking overall view of the matter therefore, the objection raised to the maintainability of the petition on behalf of the respondent no.1 is upheld. The petition is dismissed. No order as to costs.